RECORD
AND
BRIEFS

No.

Supreme Court, U.S
FILED
091029 FEB 22 2010
OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of The United States

GUY MASSI,

Petitioner,

- against -

EDWARD FLYNN, individually and as Chief of Police of the Village of Mamaroneck, ROBERT HOLLAND, as a member of the Police Department, PHILLIP TRIFILETTI, as Mayor of the Village of Mamaroneck, WILLIAM J PAONESSA, Trustee, ANTHONY VOZZA, Trustee, CHRISTIE DERRICO, Trustee, JOSEPH ANGILETTA, Trustee, and THE VILLAGE OF MAMARONECK, NEW YORK,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION

JOSEPH A. MARIA, P.C.
Attorneys for the Petitioner
301 Old Tarrytown Road
White Plains, New York 10603
(914) 684-0333

Appeal Press - (914) 761-3600 (212) 267-6602 (14453)

Library of Congress
Law Library

QUESTIONS PRESENTED

Question 1:

Does Petitioner have a valid Due Process Claim?

Question 2:

Does Petitioner, a Permanently appointed police officer and a disabled person classified as such by the Social Security Administration come within the ambit of *Enquist v. Oregon Agricultural Department* ___ . ____, 128 S. Ct. 2146 (2008)?

LIST OF PARTIES

The parties are those listed in the caption

TABLE OF CONTENTS

	Page
Questions Presented	1
List of Parties	II
Table of Contents	III
Table of Cited Authorities	IV
Table of Appendices	IV
Opinion Below	IV
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
ARGUMENT	12
Reasons for the Allowance of the Writ	
I THE PETITIONER HAS AN INTEREST PROTECTED BY THE DUE PROCESS CLAUSE	12
II *ENQUIST* SHOULD NOT BE APPLIED TO PETITIONER'S CLAIM	13
Conclusion	14

TABLE OF AUTHORITIES

United States Constitution –
Fourteenth Amendment 1

Enquist v Oregon Department of Agriculture, ____v ____ 129 S Ct 2146 (2008) 13

Haddle v Gains, 525 U S 121, 119 S Ct 489 (1998) 13

TABLE OF APPENDICES

OPINION BELOW

Summary Order of the Court of Appeals, Second Circuit, dated November 24, 2009 1a

Judgment dated October 14, 2008 5a

JURISDICTION

This Court's jurisdiction is invoked under 28 U S C §1254(1)

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

United States Constitution – Fourteenth Amendment

STATEMENT OF THE CASE

Petitioner Massi became a permanently appointed police officer in the Village of Mamaroneck, State of New York on February 7, 1994

On June 8, 2000 Petitioner was on duty when he when into a shop and was confronted on two separate occasions with a rifle carrying rapist The delayed onset of the damage of this incident later left Petitioner disabled

On June 1, 2001, Petition was promoted to sergeant

Defendant Flynn was the Chief of Police during all relevant times

To better understand the setting of the actions stated, the milieu of these occurrences is set forth in the Decision and Order (Smith, J) in a proceeding later commenced by Petitioner challenging his eventual suspension, Judge Smith stated that the these occurrences took place " against a back-drop of well

publicized serious police discord within the Village of Mamaroneck's Police Department which involves police officers' charges of misconduct by Chief Flynn, subsequent secret taping of conversations among members of the department, as well as a resultant federal lawsuit that has been brought against the Village of Mamaroneck and/or Village authorities This longstanding discord, while apparently not targeting petitioner as a participant, serves as the stage setting for the exacerbation and eventual emergence of his disability hereinafter described [1]

On April 8, 2004 Chief Flynn issued a Departmental Order directing petitioner to respond to questions concerning the alleged unauthorized recording of conversations This Departmental Order was in response to an action by Police Officer Skehan against Flynn and by the Departmental Order dated April 8, 2004, Flynn wanted Petitioner to help him in the action by Skehan

Petitioner responded in writing on April 13, 2004 essentially stating he had heard from a publically televised hearing that some recordings had been made but had not made any himself

On April 14, 2004 Chief Flynn ordered Petitioner to attend a meeting with him on April 16, 2004

On April 15, 2004, Petitioner was rushed to the hospital with severe chest pains and the records show that Petitioner had suffered an anxiety attack

By letter dated April 19, 2004 Chief Flynn wrote

---

[1] Massi v Flynn et al, 5 Misc 3d 1001

to Petitioner and directed him to attend a "Fitness for Duty" evaluation on April 22, 2004 Petitioner appeared for this evaluation yet the employer's doctor was not present While waiting for the doctor, Petitioner suffered a severe anxiety attack The evaluation was rescheduled so that the employer could retain a psychiatrist and/or psychologist to evaluate the Petitioner

Petitioner's psychologist (Dr Griffin) advised Petitioner's employer by writing dated April 23, 2004 that Petitioner suffered from Acute Stress Disorder, that Petitioner was unable to perform his police responsibilities Dr Griffin also referred Petitioner for a Post Traumatic Stress Disorder ("PTSD") evaluation Upon the evaluation, Petitioner's psychiatrist (Dr Kaitz) diagnosed PTSD - Cronic and severe attributing it to job stress

On May 5, 2004 and May 19, 2004, Petitioner attended his Fitness for Duty evaluations The employer's doctors, Drs Klahr and Dubro, the latter a psychologist who never personally examined Petitioner, both diagnosed Petitioner with adjustment disorder Dr Klahr issued his opinion that Petitioner "might" benefit from a light duty assignment, a statement that Judge Smith in the New York State proceeding (*infra*) noted was not a "ringing endorsement" let alone a definite commitment" by Dr Klahr that "petitioner was fit for light duty "[2]

Judge Smith also noted in her Decision that "

---

[2] Massi v Flynn et al, 5 Misc 3d 1001

Although subdivision 3 of section 207-c of the General Municipal Law grants municipalities the right to discontinue the salary of partially injured police officers who refuse to perform assigned light work, this great power may not be exercised summarily where, as here, the officer has received a permanent appointment

On or about May 25th, 2004 Petitioner was ordered to attend a (the rescheduled April 16, 2004 meeting) on June 2, 2004 By letter dated May 26, 2004, Dr Kaitz advised Chief Flynn that Petitioner is "medically ill and he is not fit to participate in an interview It is hard to determine when he will be fit "

Despite Dr Kaitz' letter, Chief Flynn issued two directives to Petitioner to return to duty on June 7, 2004 and to attend the June 2d, 2004 meeting Dr Kaitz again in a follow-up letter of June 1, 2004 stated that based upon his diagnosis, Petitioner was unable to attend the meeting or return to work

Petitioner did not attend the June 2, 2004 meeting, as he was being treated at a hospital emergency nor could he medically return to work as per Dr Kaitiz' previously asserted orders

On June 14, 2004 Chief Flynn preferred charges against Petitioner and suspended Petitioner without pay for failing to report to work and attend the meeting Petitioner was medically unable to perform these actions and, indeed, Dr Kaitz in previous orders that were known to Chief Flynn, had directed that Petitioner not perform such functions Petitioner claims that this suspension was retaliatory on behalf of the Village of

Mamaroneck and Chief Flynn because of Petitioner's failure to cooperate in the investigation of P O Skehan under the April 8, 2004 Departmental Order (infra) and aimed at denying Petitioner his GML207-c benefits ("207-c Benefits") [3] This suspension was in violation of the Rules and Regulations of the Mamaroneck Police Department which vest the power to suspend without pay only in the Village Board of Trustees The suspension was performed unilaterally by Chief Flynn and the Village Board never approved such summary action

Defendant Flynn's actions were unreasonable When he suspended Petitioner without pay, he failed to act as an objectively reasonable official would have He deliberately disregarded the evidence before him which included the medical report of Dr Ronald Kaitz, Dr Raymond Griffin, and Dr Klahr In short, all the reports reported that Petitioner suffered from PTSD

Defendant Flynn had never suspended any police officer without pay One police officer who failed to report for light duty was never suspended Said police office was hospitalized in his attempt to report for light duty That police officer remained on the payroll and was out on sick leave Another police officer was out on sick leave for as long as two years and always remained

---

[3] New York General Municipal Law § 207-c provides in substance that police officers (or other municipal workers) who become disabled from an injury sustained in the performance of their duties, are entitled to the full amount of their salary and to medical costs paid by the municipality until the disability ceases or if the police officer is granted an accidental disability retirement

on the payroll

Petitioner was suspended without pay without a hearing in violation of the Department's Rules and Regulations

In violation of the rules and regulations, defendant Trustees did not conduct a hearing and permitted petitioner's suspension without pay without any investigation

After petitioner's suspension without pay, Chief Flynn and Defendant Holland willfully submitted false allegations against Petitioner and caused an investigation to be made based on those accusations as heretofore described

Admittedly, Chief Flynn's inquiries about P O Skehan only concerned reports that Skehan was repeatedly late for work

There is no evidence Petitioner told Chief Flynn that he never received any complaints about Skehan

Chief Flynn instigated what was he categorized as an "internal investigation" in retaliation against Petitioner for the July 19, 2004 charges He appoint Detective Holland the investigating officer

Holland interviewed selected officers Notably, however, there are no written signed and sworn statements against the Petitioner as part of this "internal investigation " Holland recorded his interviews and wrote his report yet destroyed the interview tapes This is clearly unconstitutional

In early June of 2004, Petitioner attempted to apply for the 207-c Benefits The defendants

deliberately delayed Petitioner's application by failing to respond to Petitioner's requests for application form Judge Smith found the delay was intentional so that Chief Flynn and the Village could use disciplinary authority to turn Petitioner's illness into a means of suspending him for failure to follow the two Departmental Orders [4] As of the time of the decision of that court (December 22, 2004), the proper form for applying for 207-cBenefits had still not been provided to the Petitioner (Id At pg 3), a delay of more than six (6) months!

On July 19, 2004 Flynn issued a Department Order charging petitioner with charges going back as far as 2001 It was never explained why such dated alleged violations were not pursued until some three years after occurrence The inference is clear that such allegations were used not as a disciplinary measure but for other purposes The charges concerned P O Skehan's alleged lateness, alleged lewd actions by Petitioner and alleged non-definable racial slurs by Petitioner At the time of the bringing of the charges in 2004, Skehan was the plaintiff in an action against Village of Mamaroneck, Chief Flynn and others (Skehan v Kelly , 03-civ-5977)

P O Kelly was the one who also gave Flynn information as to the alleged lewd remarks and the alleged purchase by Petitioner of recording devices by Petitioner Such accusations were not properly investigated to ascertain their truth Again, the reason

---

[4] Massi v Flynn et al, 5 Misc 3d 1001 (pg 3)

for this is that Petitioner did not help Chief Flynn in the suit of P O Skehan against Chief Flynn

Also Detective Holland conducted an alleged investigation in which he conspired with Flynn against Petitioner As stated above, Holland conducted the investigation wherein he recorded the statements of police officers These statements included statements of P O Kelly and one P O Girardi Tellingly, there are also no written signed and sworn records of those statements and, presumably, the tapes of the interviews were destroyed by Detective Holland Both these officers were subsequently promoted to the rank of sergeant on June 5, 2005

The charges in the July 19, 2004 Departmental Order never were pursued by the prosecutors and there never was a hearing

The July 19, 2004 Departmental Order charges were instituted against Petitioner as a punishment for Petitioner in not aiding the Village or Chief Flynn in the lawsuit of P O Skehan against them and to deny Petitioner his 207-c Benefits

On July 31, 2004, petitioner was referred to PTSD Specialist, Laurence Kolman, Ph D and he continued under Dr Kolman's care on a weekly basis

Dr Kolman made a diagnosis of Post Traumatic Stress Disorder – chronic and severe with delayed onset, relating it to the critical incident that occurred on June 8, 2000 while Petitioner was in the line of duty In that incident, Petitioner was twice faced with a rifle-armed rapist at short range

Petitioner commenced a proceeding (previously mentioned) in New York State Supreme Court to challenge his dismissal The result of that proceeding was an Order which directed *inter alia* that the Village provide the Petitioner with a 207-c Benefits hearing and the defendants were reminded that GML 207-c should be liberally construed Judge Smith states "Here, it appears that Sgt Massie has sustained prima facie showing of entitlement to GML Law § 207-c benefits "

The 207-c Benefits "hearing" was finally held on April 25, 2005, approximately a year after Petitioner attempted to apply This hearing was not a hearing but just a review by which the employer denied the Petitoner his 207-c Benefits

Lt Matero was the "hearing" officer who conducted the hearing which was compelled by the mentioned proceeding She was also the alleged recipient of the lewd actions charged against Petitioner in the July 19 Departmental Order, charges that were never pursued by the charging authority nor was there ever any hearing

Chief Flynn, an attorney himself, testified that he relied on the Village counsel for an interpretation of said decision He was advised that they need only review medical documentation and made a determination According to Flynn, Petitioner's opportunity to be heard was satisfied merely by his submission of medical documentation

On June 25, 2005, Dr Kolman submitted a

report clarifying his diagnosis In his opinion, plaintiff suffers from PTSD and that "virtually anything connected in any way to one's employment situation could actuate the PTSD-related symptoms " It also stated that Petitioner was completely disabled

Defendants inhibited Petitioner's right to due process Their so-called hearing, allegedly held in compliance with the Order of Judge Smith, was conducted by an interested party, a member of their own department, who was not required to provide any documentation to substantiate her denial of 207-c benefits, and whose decision was based on submitted medical documentation

Petitioner was denied his right of due process by not being allowed to cross-examine the medical information supplied to Lieutenant Matero

Thereafter in response to a further order of Judge Smith (April 27, 2006), a 207-c Benefits hearing was conducted before one Vicent D'Andrea It is noted that D'Andrea was selected and paid by the defendants D'Andrea did not give proper weight to the Petitioner's medical evidence

No other police officer has been so treated as such by defendants

Petitioner had commenced a proceeding to overturn the decision of D'Andrea and such proceeding is pending

Petitioner was been classified disabled by the Social Security Administration as of April 15, 2004 and is currently receiving benefits

By Order (Siebel, J) dated October 14, 2008, Petitioner's complaint was dismissed and, upon appeal, the dismissal was affirmed by Summary Order of the Secon Circuit Court of Appeals dated November 24, 2009

ARGUMENT
REASONS FOR ALLOWANCE OF WRIT

I. PETITIONER HAS AN INTEREST PROTECTED BY THE DUE PROCESS CLAUSE

The due process clause of Article IV of the Constitution protects, *inter alia*, a property interest held by claimant that is unduly interfered with by state action

Petitioner demonstrates that he was denied due process because 1) he did not receive a timely hearing when he was seeking disability benefits under General Municipal Law §207-c, 2) he was suspended without pay by Chief Flynn in violation of the Rules and Regulations of the Mamaroneck Police Department (the Village Trustees only had that power), 3) he was given a 207-c hearing only when the defendants were ordered to after a judicial proceeding, 4) the officer who presided over the first "hearing" took no testimony from Petitioner, 5) the officer who presided over the first "hearing" was a member of the police force, the object of alleged lewd actions made by Petitioner and therefore interested and biased, 6) the defendants only held a hearing on Petitioner's 207-c benefits after being ordered by the New York State Supreme court, 7) in the 2nd "hearing" the officer's conclusions failed to give proper weight to the medical evidence presented by the Petitioner, 8) the detective who conducted the disciplinary investigation purposefully destroyed evidence and the charges that were brought against Petitioner under the July 19, 2004 Departmental Order have never been prosecuted

In essence, Petitioner is alleging a conspiracy to first remove him from his employment as a police officer and then to deny him the benefits under General Municipal Law §207-c

The Second Circuit stated that "because he was ineligible for disability benefits" Petitioner had "no property interest in such benefits – a predicate showing for a due process claim (Summary Order dated November 24, 2009)

The issue of Petitioner's retirement benefits is not settled and Petitioner is not "finally" ineligible for benefits Although, there was a decision by a hearing officer chosen by the defendants denying those benefits, Petitioner had commenced a proceeding seeking *inter alia* to overturn that decision (Massi v Flynn, *et al* , New York State Supreme Court, 10950-2004) which has been transferred to the Appellate Division, Second Department The Petitioner is claiming that the decision was arbitrary and capricious That matter is *sub judice*

Also, a fair reading of the Complaint sets forth a conspiracy with Flynn, Holland and Mateo as the principal actors Even though Petitioner may be classified as an at-will employee, such an allocation of a conspiracy denying due process requires no showing of a property interest *Haddle v Gains*, 525 U S 121, 119 S Ct 489 (1998)

II. ENQUIST SHOULD NOT BE APPLIED TO PETITIONER'S CLAIM

The Second Circuit applied *Enquist v Oregon Department of Agriculture*, ____v _____ 129 S Ct 2146 (2008) stating the "class of one" does not apply in the public employment area

Although the Court did not discuss the facts, it is important to note that there are equal protection viable claims alleged, as evidenced by the Memorandum and Order in this matter of Hon Charles Brieant (deceased) dated February 1, 2005

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the twenty-fourth day of November, two thousand and nine

PRESENT

ROGER J MINER
JOSÉ A CABRANES,
CHESTER J STRAUB,

Circuit Judges

November 24, 2009

GUY MASSI,

Plaintiff-Appellant,

-v -

No 08-5588-cv

EDWARD FLYNN, individually and as Chief of Police of the Village of Mamaroneck, ROBERT HOLLAND, as a member of the Police Department, PHILIP TRIFILETTI, as Mayor of The Village of Mamaroneck, WILLIAM J PAONESSA, Trustee, ANTHONY VOZZA, Trustee, CHRISTIE DERRICO, Trustee, JOSEPH ANGILETTA, Trustee, THE VILLAGE OF MAMARONECK, NEW YORK,

Defendants-Appellees,

JOHN O'RILEY, as Village Attorney of the Village of Mamaroneck,

Defendant

FOR PLAINTIFF-APPELLANT

JOSEPH A MARIA, White Plains, NY

FOR DEFENDANTS-APPELLEES

JOSEPH A SACCOMANO, JR ,
Jackson Lewis LLP, White Plains, NY

Appeal from an October 14, 2008 judgment of the United States District Court for the Southern District of New York (Cathy Seibel, *Judge*)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be **AFFIRMED**

Plaintiff-appellant Guy Massi appeals from the District Court's dismissal of his equal protection and due process claims against defendants Edward Flynn, individually and as Chief of Police of the Village of Mamaroneck, Robert Holland, as a member of the Police Department, Philip Trifiletti, as Mayor of the Village of Mamaroneck, Trustees William J Paonessa, Anthony Vozza, Christie Derrico, and Joseph Angiletta, as well as the Village of Mamaroneck, New York (collectively, "defendants") Massi alleges that his employer, the Village of Mamaroneck Police Department, intentionally treated him "differently from others similarly situated" by filing two sets of disciplinary charges against him and suspending him without pay and failing to afford him sufficient due process The District Court granted defendants' motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure and dismissed Massi's claim On appeal, plaintiff alleges that the dismissal of his equal protection and due process claims was erroneous We assume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal

We review *de novo* the District Court's decision to dismiss a suit on a motion under Rule 12(b)(6) *See, e g , Amron v Morgan Stanley Inv Advisors Inc* , 464 F 3d 338, 343 (2d Cir 2006)

Massi does not assert a "standard" equal protection claim—that he was treated differently than other similarly situated employees based on his membership in a specific protected class Rather, he claims that he is a "class of one" who was treated maliciously due to his alleged post-traumatic stress disorder and his failure to cooperate with Flynn's investigation of another police officer As noted by the District Court, Massi's equal protection claim is barred by the Supreme Court's decision in *Engquist v Or Dep't of Agric* , 128 S Ct 2146 (2008), which overruled Second Circuit precedent that had recognized "class of one" equal protection claims In *Engquist*, the Supreme Court held that a public employee does not state a claim under the Equal Protection Clause unless he alleges that he was treated differently *based on his membership in a particular class* 128 S Ct at 2156 ("If] plaintiffs need not claim discrimination on the basis of membership in some class or group, but rather may argue only that they were treated by their employers worse than other employees similarly situated, any personnel action in which a wronged employee can conjure up a claim of differential treatment will suddenly become the basis for a federal constitutional claim ") Because Massi claims only that he was treated differently from other similarly situated employees for malicious reasons or due to his alleged psychological injury and failure to cooperate with Flynn's investigation of another police officer, and not on the basis of his membership in any particular class, his equal protection claim is barred by *Engquist*

Massi also argues that the District Court erred in dismissing his due process claim because (1) he did not timely receive a hearing when seeking disability

benefits under General Municipal Law § 207-c, (2) the hearing officer was not independent, and (3) the hearing officer's adverse conclusions were incorrect We conclude that because plaintiff was ineligible for disability benefits, he had no property interest in such benefits—a predicate showing for a due process claim—and thus could not have been deprived of due process in seeking those benefits In any event, Massi did receive a hearing and has challenged the result of that hearing by bringing an Article 78 proceeding—an adequate pre- and post- deprivation procedure available under New York law *N Y State Nat'l Org for Women v Pataki*, 261 F 3d 156, 168 (2d Cir 2001) (holding that Article 78 proceedings provide a meaningful pre-deprivation process), *Hellenic Am Neighborhood Action Comm v City of New York*, 101 F 3d 877, 881 (2d Cir 1996) (holding that "an Article 78 proceeding is a perfectly adequate postdeprivation remedy" for alleged arbitrary acts of state employees) Accordingly, we affirm the District Court's order dismissing plaintiff's due process claim

In sum, we have considered each of plaintiff's arguments on appeal and find them to be without merit

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the District Court

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk of Court

By _____

ISSUED AS A MANDATE DEC 17 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

GUY MASSI,

Plaintiff,

- against -

04 Civ.06939(CS)
JUDGMENT

EDWARD FLYNN, Individually and as Chief of Police of the Village of Mamaroneck, ROBERT HOLLAND, as a member of the Police Department, PHILLIP TRIFILETTI, as Mayor of the Village of Mamaroneck, WILLIAM J PAONESSA, Trustee, ANTHONY VOZZA, Trustee, CHRISTIE DERRICO, Trustee, JOSEPH ANGILETTA, Trustee, THE VILLAGE OF MAMARONECK, NEW YORK, JOHN O'RILEY, as Village Attorney of the Village Of Mamaroneck,

Defendants

----------X

Whereas the above entitled action having been assigned to the Honorable Cathy Seibel, U S D J , and the Court thereafter on October 8, 2008, in open court, having handed down a Memorandum to the Docket Clerk, dismissing this action, it is,

ORDERED, ADJUDGED AND DECREED that the Court, upon oral argument heard on a motion to dismiss, dismisses this action, and the case is hereby closed

DATED White Plains, N,Y October 14, 2008

J Michael McMahon
Clerk of Court

No. 09-1029

Supreme Court, U.S.
FILED
MAR 29 2010
OFFICE OF THE CLERK

IN THE

United States Supreme Court

GUY MASSI,

Petitioner,

against

EDWARD FLYNN, individually and as Chief of Police of the Village of Mamaroneck, ROBERT HOLLAND, as a member of the Police Department, PHILLIP TRIFILETTI, as Mayor of the Village of Mamaroneck, WILLIAM J. PAONESSA, Trustee, ANTHONY VOZZA, Trustee, CHRISTIE DERRICO, Trustee, JOSEPH ANGILETTA, Trustee, and THE VILLAGE OF MAMARONECK, NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Joseph A. Saccomano, Jr.
Jonathan M. Kozak*
**Counsel of Record*
Jackson Lewis LLP
One North Broadway, 15th Floor
White Plains, New York 10601
(914) 328-0404

QUESTION PRESENTED

1.Whether the District Court and Court of Appeals properly dismissed Petitioner's class-of-one equal protection claim as a matter of law?

2.Whether the District Court and Court of Appeals properly dismissed Petitioner's due process claim as a matter of law?

TABLE OF CONTENTS

page

QUESTIONS PRESENTED i

COUNTER-STATEMENT OF THE CASE 1

I. Massi's Employment With The Village of Mamaroneck Police Department. 1

II. Massi Received Disciplinary Charges For Failing To Appear For An Interview With Chief Flynn And For Refusing To Report For Light Duty. 2

III. Massi Received A Second Set Of Disciplinary Charges For Further Violations Of VMPD Rules And Regulations. 6

IV. Massi's Applications For Disability, Retirement And Workers' Compensation Benefits And Related Court Proceedings. 7

V. Massi's Federal Court Lawsuit And Related Appeals. 10

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI 14

I. The Petition Does Not Present A Conflict Between The Circuits Or An Important Federal Question 14

II. The District Court And Court Of Appeals Properly Dismissed Massi's Due Process Claim As A Matter Of Law. 15

A. Massi Does Not Possess a Property Interest In The Receipt Of GML § 207-c Benefits..... 15

B. Respondents Provided Massi Notice And An Opportunity To Be Heard Prior To Denying His Application For GML § 207-c Benefits .. 17

C. Massi Has An Adequate Post-Deprivation Procedure To Challenge Any Purported Deprivation Of His Property Interests..... 18

D. Massi Improperly Attempts To Advance New Legal Arguments In His Petition..... 19

III. The District Court And Court Of Appeals Properly Dismissed Massi's Equal Protection Claim As A Matter Of Law 20

CONCLUSION..... 22

TABLE OF AUTHORITIES

FEDERAL CASES *page(s)*

Bath Iron Works Co. v. Director, Office of Workers' Compensation Programs, 506 U.S. 153, 113 S. Ct. 692 (1993) 19, 21

Bd. of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972) 16

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487 (1985) 17

Engquist v. Or. Dep't of Agric., 553 U.S. 591, 128 S. Ct. 2146 (2008) 13, 20

Finley v. Giacobbe, 79 F.3d 1285 (2d Cir. 1996) 16

Green v. Bauvi, 46 F.3d 189 (2d Cir. 1995) 16

Gudema v. Nassau County, 163 F.3d 717 (2d Cir. 1998) 19

Hellenic American Neighborhood Action Committee v. City of New York, 101 F.3d 877 (2d Cir. 1996) 18

Moccio v. New York State Office of Court Administration, 95 F.3d 195 (2d Cir. 1996) 18

Rayway Ref. Co. v. Oxygenated Mtkg. & Trading A.G., 215 F.3d 219 (2d Cir. 2000) 19, 21

Rivera-Powell v. New York City Bd. of Elections, 470 F.3d 458 (2d Cir. 2006) 18

Singleton v. Commissioner, 439 U.S. 940, 99 S. Ct. 335 (1978) 15

Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994) 18

Vargas v. City of New York, 377 F.3d 200 (2d Cir. 2004) 18

STATE CASES

Cole-Hatchard v. Sherwood, 309 A.D.2d 933, 766 N.Y.S.2d 113 (2d Dep't 2003) 16

De Paolo v. County of Schenectady, 200 A.D.2d 277, 613 N.Y.S.2d 492 (3d Dep't 1994) 16

McTigue v. Town of Clarkstown, 21 A.D.3d 374, 798 N.Y.S.2d 915 (2d Dep't 2005) 16

Olivier v. County of Rockland, 260 A.D.2d 482, 688 N.Y.S.2d 580 (2d Dep't 1999) 16

Schenectady County Sheriff's Benevolent Ass'n v. McEvoy, 124 A.D.2d 911, 508 N.Y.S.2d 663 (3d Dep't 1986) 16

FEDERAL STATUTES

42 U.S.C. § 1983 ..... 11, 12, 16, 18

STATE STATUTES

General Municipal Law
Section 207-c..... 7, 8, 9, 10, 13, 14, 15, 16, 17, 18, 19

New York Civil Practice Law and Rules Article 78 .... 7, 10, 11, 12, 13, 14, 15, 17, 18, 19

New York Unconsolidated Laws
Section 5711-q..... 5, 11, 12

COUNTER-STATEMENT OF THE CASE

I. Massi's Employment With The Village of Mamaroneck Police Department.

Petitioner Guy Massi ("Massi"), a Sergeant employed by the Village of Mamaroneck Police Department ("VMPD"), brought this action against Respondents Edward Flynn, Chief of Police of the Village of Mamaroneck, Detective Sergeant Robert Holland (now retired); (2) former Mayor Philip Trifiletti; (3) former Village of Mamaroneck Trustees William J. Paonessa, Anthony Vozza, Christie Derrico and Joseph Angilletta (hereinafter collectively referred to as the "Board of Trustees"); (4) the Village of Mamaroneck; and (5) Defendant John O'Reilly, labor counsel to the Village of Mamaroneck.

Massi began his employment as a police officer with the VMPD on February 7, 1994. On June 8, 2000, Massi responded to a dispatcher call regarding a merchant complaint at a store located in the Village of Mamaroneck. According to Massi, he and Sergeant Monachelli entered the store and observed the merchant and a customer, both of whom were females. According to Massi, the merchant mouthed the word "gun" and Massi then saw a man in the store pointing a gun at him. Sergeant Monachelli, Massi, the customer and the merchant all ran out of the store. Massi exited the store before the merchant. The merchant was the last person to exit the store. By this time, numerous VMPD officers had arrived at the scene. The suspect surrendered without any officer or the suspect discharging their weapon.

Massi took a statement from the merchant. In the statement, the merchant stated that she had been raped by the man in the store. She also described the events in a manner indicating that Massi was not confronted by the man with a gun. Massi told the District Attorney a different version of events that transpired inside the store than what the merchant/ rape victim reported. The merchant testified at Massi's subsequent Workers' Compensation hearing that the suspect did not point his gun at Massi.

No VMPD member who participated in the June 8, 2000 incident was referred to the VMPD psychologist pursuant to the Department's Post Critical Incident Debriefing policy, General Order No. 19.07. Prior to April 15, 2004 - - almost four years after this incident - - Massi did not inform any VMPD member that he suffered from any emotional or physical issues as a result of the June 8, 2000 incident.

Following the June 8, 2000 incident, Massi interviewed for a promotion to the rank of sergeant. In June 2001, Massi was promoted to the rank of sergeant. Chief Flynn recommended Massi for the promotion.

II. Massi Received Disciplinary Charges For Failing To Appear For An Interview With Chief Flynn And For Refusing To Report For Light Duty.

In or about January or February 2003, Chief Flynn and Massi discussed whether Massi had any problems with another police officer. Chief Flynn initiated this meeting to clarify reports he had received indicating

that the police officer was reporting late for his tour of duty. Massi supervised the officer and it was Massi's responsibility to ensure he reported on time for his tour of duty. Massi informed Chief Flynn that he did not experience any problems with the officer.

In February 2003, Chief Flynn initiated a second meeting with Massi because Chief Flynn received additional reports that the police officers on Massi's squad complained to Massi that the officer received preferential treatment. Notwithstanding these complaints, Massi reiterated to Chief Flynn that he had no problems with the officer. However, officers in Massi's squad met with Massi and stated they were upset that the officer made numerous switches to different tours of duty in order to avoid certain post assignments. Additionally, the officer admitted in a deposition that he repeatedly arrived late for work.

During the disciplinary hearings regarding the officer, Massi and the VMPD learned that certain police officers recorded conversations with other officers in violation of VMPD rules and regulations. On April 8, 2004, Massi received a Departmental Order from Chief Flynn. The April 8, 2004 Departmental Order required Massi to submit a written report in response to the information contained in the Order regarding the unauthorized recording of police officers. Other police officers received similar orders to the April 8, 2004 Order issued to Massi.

On or about April 13, 2004, Massi prepared a memorandum in response to Chief Flynn's April 8, 2004 Order. Massi's April 13, 2004 memorandum contained a summary of the information requested by

Chief Flynn. On April 14, 2004, Chief Flynn issued Massi a Departmental Order requiring him to appear for a meeting with Chief Flynn on April 17, 2004. Massi received the April 14, 2004 Departmental Order at the beginning of his midnight to 8:00 a.m. tour of duty on April 15, 2004. Chief Flynn requested the meeting with Massi to discuss the contents of his April 8, 2004 Departmental Order and Massi's response dated April 13, 2004.

At the end of his April 15, 2004 shift, Massi returned to his home. On April 15, 2004, at approximately 4:00 p.m., Massi allegedly awoke from a nightmare regarding the June 8, 2000 incident. Massi was briefly admitted to the hospital as a result of this alleged nightmare. Massi did not report for his interview with Chief Flynn on April 17, 2004. Since April 15, 2004, Massi has not returned to work or communicated with Chief Flynn. Massi claims that since April 15, 2004, he has been completely disabled and unable to work.

Because Massi claimed he was unable to work, on April 19, 2004, Lieutenant Mary Matero ordered Massi to appear at Industrial Medicine Associates for a fitness for duty evaluation. On May 19, 2004, Aryeh Klahr, M.D. evaluated Massi regarding his psychiatric fitness for duty as a police officer for the Village of Mamaroneck. Dr. Klahr concluded that while Massi was not psychiatrically fit to perform full police duties or carry a weapon, he could perform light duties. Dr. Klahr further concluded that performing light duty could be beneficial for Massi. When Chief Flynn spoke to Dr. Klahr, Dr. Klahr told him Massi was able to participate in an interview by the Chief and work

light duty. Based on Dr. Klahr's medical conclusions, Chief Flynn issued Massi a Departmental Order to report for light duty commencing June 7, 2004. Chief Flynn also issued Massi a second Departmental Order dated May 28, 2004, ordering Massi to appear for an interview with Chief Flynn on June 2, 2004.

Massi discussed the Departmental Orders to report for light duty and to appear for an interview with his Police Benevolent Association ("PBA") attorney. Massi's PBA attorney cautioned Massi that he "shouldn't be surprised if [he] got suspended if [he] didn't go back to work." As of May 28, 2004, Massi still had never appeared for the originally scheduled interview with Chief Flynn. Massi also did not appear for his June 2, 2004 interview with Chief Flynn or report for light duty.

On June 15, 2004, Massi received a Departmental Order and Notice of Discipline dated June 14, 2004, informing him that he was suspended from duty without pay pending a trial on his disciplinary charges pursuant to New York Unconsolidated Laws § 5711-q. Chief Flynn has the authority to suspend a police officer without pay pursuant to N.Y. Unconsolidated Laws § 5711-q(21). In addition, the Board of Trustees has the power to suspend without pay, pending trial of the charges, any member of the police force. See N.Y. Unconsolidated Laws § 5711-q(9). Massi was charged with violating five provisions of the Rules and Regulations Governing the Police Department of the Village of Mamaroneck ("Rules and Regulations") by failing to comply with the two orders issued by Chief Flynn: (1) to appear for the interview on June 2, 2004;

and (2) to report for light duty on June 7, 2004. Massi is not aware of any other police officer who failed to comply with an order from Chief Flynn to attend an interview or to report for light duty.

III. Massi Received A Second Set Of Disciplinary Charges For Further Violations Of VMPD Rules And Regulations.

In or about June 2004, prior to preferring additional disciplinary charges against Massi, Chief Flynn directed Detective Sergeant Holland to conduct an investigation regarding allegations that: (1) Massi falsely reported to Chief Flynn that no members of Massi's tour complained to him about an officer reporting late to work; (2) Massi directed lewd and degrading sexual gestures toward Lieutenant Matero; and (3) Massi referred to African-Americans as "spoons" and "Canadians." As part of the internal investigation, Detective Sergeant Holland interviewed police officers Regan Kelly, Eugene Guadagnolo, Dominick Carelli, Steve Girardi, Ossie Ramos and Doug Baron and Lieutenants Mary Matero and Hank Paul. Contrary to Petitioner's nefarious accusation, the evidence collected by Detective Sergeant Holland accompanied the Internal Investigation Report he provided to Chief Flynn. On July 19, 2004, Massi was served with a second set of disciplinary charges for: (1) his failure to take corrective action or report that the officer reported late to work; (2) falsely reporting to Chief Flynn that the officer did not report late to work or that police officers under Massi's command did not complain regarding the officer's repeated lateness; (3) directing lewd, degrading and sexual gestures toward

a female superior officer; and (4) referring to African-Americans as "Spoons." Plaintiff has not presented any evidence that the allegations contained in Detective Sergeant Holland's Internal Investigation Report and the July 19, 2004 disciplinary charges preferred against Plaintiff are false.

IV. Massi's Applications For Disability, Retirement And Workers' Compensation Benefits And Related Court Proceedings.

On or about June 9, 2004, Massi applied for disability benefits under General Municipal Law ("GML") § 207-c. On June 12, 2004, Massi applied for New York State Retirement benefits because he was no longer capable of working as a police officer. On or about March 13, 2006, Massi's application for Performance of Duty Disability Retirement benefits was denied. In addition, Massi applied for Workers' Compensation benefits due to the post traumatic stress disorder he claims he experienced regarding the June 8, 2000 incident. By decision dated December 18, 2006, the Workers' Compensation Board affirmed the Workers' Compensation Law Judge's denial of Massi's claim for Workers' Compensation benefits, and the judge's finding that Massi's psychological symptoms were caused by Respondents' lawful investigation of possible unauthorized and illegal activities of VMPD officers as opposed to the incident of June 8, 2000.

On July 22, 2004, Massi filed a petition in New York State Supreme Court, Westchester County, pursuant to New York Civil Practice Law and Rules ("CPLR") Article 78, seeking to prohibit the Village

of Mamaroneck and Chief Flynn from enforcing the disciplinary charges served on Massi and compelling the Village of Mamaroneck to restore him to the payroll retroactive to June 14, 2004. On December 22, 2004, Justice Mary H. Smith issued a Decision, Order and Judgment refusing to annul Massi's suspension without pay and ordering the Village of Mamaroneck to process Massi's application for GML § 207-c benefits to determine his eligibility for such benefits. Justice Smith also held that "[t]he law is well settled that [the] Chief of Police in Westchester County has the authority to suspend a police officer pending the trial on disciplinary charges."

Respondents provided Massi notice and an opportunity to submit evidence in support of his GML § 207-c application. Specifically, by letter dated February 28, 2005, Lieutenant Matero informed Massi that the Village of Mamaroneck scheduled him for an examination by Andrew P. Levin, M.D. to determine his eligibility for GML § 207-c benefits. Lieutenant Matero further advised Massi that his own physician also could conduct an examination and that he would be afforded an opportunity to submit additional medical documentation in support of his GML § 207-c application. On March 18, 2005, Dr. Levin examined Massi. On April 22, 2005, Dr. Levin issued a report following his examination of Massi. Dr. Levin diagnosed Massi as "malingering" and further noted that "the appearance of severe symptoms coincided with and enabled the claimant to avoid an ongoing investigation at work." On or about April 25, 2005, after Massi declined an opportunity to submit additional evidence in support of his GML § 207-c

application, Lieutenant Mary Matero, relying on the uncontroverted diagnosis of Dr. Klahr, informed Massi that the Village of Mamaroneck denied his application for GML § 207-c benefits.

On or about March 13, 2006, Massi filed an Order To Show Cause in New York State Supreme Court, County of Westchester, seeking an Order: (1) directing Respondents to conduct a GML § 207-c hearing; (2) staying Massi's disciplinary hearing scheduled for March 14, 2006; and (3) awarding Massi his salary and benefits retroactive to June 14, 2004. By Decision and Order dated April 27, 2006, Justice Smith vacated the Village of Mamaroneck's April 25, 2005 denial of Plaintiff's GML § 207-c benefits and ordered the Village of Mamaroneck to conduct a "GML § 207-c hearing" before an independent hearing officer to determine Massi's eligibility for such benefits. Justice Smith also enjoined the Village of Mamaroneck from conducting Massi's disciplinary hearing until a determination was rendered on his eligibility for GML § 207-c benefits. The Village of Mamaroneck appealed Justice Smith's April 27, 2006 Decision and Order on the grounds, *inter alia*, that New York law does not provide for a GML § 207-c hearing. Notwithstanding the appeal, the Village of Mamaroneck provided Massi a GML § 207-c hearing in compliance with Justice Smith's Order. On or about December 11, 2007, the New York State Supreme Court, Appellate Division, Second Department, dismissed the Village of Mamaroneck's appeal as academic because the Village of Mamaroneck already provided Massi the hearing.

The hearing was conducted before Hearing Officer Vincent P. D'Andrea. On or about June 27, 2008, Mr. D'Andrea denied Massi's application for GML § 207-c benefits, finding Massi was malingering the symptoms of PTSD and was capable of performing light duty work. The Village of Mamaroneck Board of Trustees adopted Mr. D'Andrea's decision. On September 18, 2008, consistent with the hearing officer's decision, Chief Flynn offered Massi the opportunity to report for a light duty assignment. Massi refused the offer to report for light work duty.

On or about October 8, 2008, Massi filed another petition in New York State Supreme Court, Westchester County (Index No. 22700/08), pursuant to CPLR Article 78, seeking review of the Village of Mamaroneck's September 8, 2008 determination which confirmed the determination of Hearing Officer Mr. D'Andrea denying Massi benefits pursuant to General Municipal Law § 207-c. On March 16, 2009, Justice Lester B. Adler issued a Decision, Order and Judgment transferring the case to the New York State Supreme Court, Appellate Division, Second Department. To date, the Appellate Division has not acted on Massi's petition.

V. Massi's Federal Court Lawsuit And Related Appeals.

Massi alleges Respondents treated him in a disparate manner and subjected him to selective prosecution by preferring two sets of disciplinary charges against him and suspending him without pay. Massi originally brought claims alleging: (1) violation

of his right of free speech under the First Amendment, 42 U.S.C. § 1983 (First Claim); (2) violation of his right to equal protection and selective prosecution under the Fourteenth Amendment, 42 U.S.C. § 1983 (Second and Third Claims); (3) violation of his right to equal protection under the Fourteenth Amendment, 42 U.S.C. § 1983 on the basis that N.Y. Unconsolidated Laws § 5711-q, authorizing the unpaid suspension of a police officer pending a disciplinary hearing, is unconstitutional on its face and as applied to Massi (Fourth and Fifth Claims); and (4) negligence against Chief Flynn under a pendent state law claim (Sixth Claim).

By Memorandum and Order dated February 1, 2005, the District Court dismissed Massi's Complaint in its entirety as to Village Attorney John O'Reilly. The District Court also dismissed the First and Sixth claims as to all Respondents, dismissed the Fourth and Fifth claims as to the individual Respondents, and denied Massi's cross-motion to amend the Complaint. The District Court held that N.Y. Unconsolidated Laws § 5711-q permits the Board of Trustees to suspend a police officer indefinitely without pay pending a disciplinary hearing. The District Court further held that if Massi intended to proceed with his Fourth and Fifth claims against the Village of Mamaroneck regarding the constitutionality of N.Y. Unconsolidated Law § 5711-q, he had to comply with Local Civil Rule 24.1 of the United States District Court for the Southern District of New York, and serve the New York State Attorney General with notice.

On November 30, 2005, Respondents moved for summary judgment on Massi's remaining claims: the Second and Third claims alleging unequal treatment and selective prosecution under the Fourteenth Amendment, 42 U.S.C. § 1983; and the Fourth and Fifth claims against the Village of Mamaroneck regarding the constitutionality of N.Y. Unconsolidated Laws § 5711-q. On January 31, 2006, Massi filed a cross-motion for summary judgment to add a procedural due process claim.

In its May 15, 2006 Memorandum and Order, the District Court: (1) dismissed the Fourth and Fifth claims regarding the constitutionality of N.Y. Unconsolidated Law § 5711-q due to Massi's failure to comply with Local Rule 24.1; (2) denied the Respondents' motion on Massi's Second and Third claims for selective prosecution and unequal treatment; (3) denied Massi's cross-motion for summary judgment; (4) granted Massi leave to amend to add a due process claim and denied the Respondents' summary judgment motion as to that claim; and (5) denied Chief Flynn's motion for summary judgment on the basis of qualified immunity. Therefore, the only remaining claims in the case were Massi's Second and Third claims based on equal protection and the newly added due process claim.

On or about May 24, 2006, Chief Flynn appealed the denial of his motion for summary judgment based on the defense of qualified immunity as to the remaining claims. In addition, all Respondents requested the United States Court of Appeals for the Second Court to exercise pendent appellate jurisdiction over the

District Court's denial of their motion for summary judgment on the remaining claims. On November 16, 2007, the Second Circuit affirmed the decision of the District Court and remanded the case to the District Court.

On September 10, 2008, Respondents requested that the District Court dismiss Massi's remaining claims for equal protection and due process violations. Respondents argued that this Court's decision in Engquist v. Or. Dep't of Agric., 553 U.S. 591, 128 S. Ct. 2146 (2008) invalidated Massi's "class of one" equal protection claim. In addition, Respondents argued Massi's due process claim failed as a matter of law because: (1) Massi could not demonstrate that he was deprived of a protected property interest in order to state a valid due process claim; (2) Respondents provided Massi notice and an opportunity to be heard prior to denying his application for GML § 207-c benefits and also provided him a GML § 207-c hearing; and (3) Massi had an adequate post-deprivation state remedy to safeguard his alleged property right which he is currently pursuing through his New York Civil Practice Law and Rules Article 78 ("Article 78") petition. On October 8, 2008, the District Court dismissed Massi's equal protection and due process claims.

On November 10, 2008, Massi filed a Notice of Appeal. Massi limited the issues on appeal to the District Court's ruling that Massi's equal protection and due process claims failed as a matter of law. Massi did not appeal the dismissal of any of his other causes of action. By Summary Order dated November

24, 2009, the Second Circuit affirmed the judgment of the District Court. The Second Circuit held that this Court's Engquist decision barred Massi's equal protection claim because "Massi only claims that he was treated differently from other similarly situated employees for malicious reasons or due to his alleged psychological injury and failure to cooperate with Flynn's investigation of another police officer, and not on the basis of his membership in any particular class." (See Petitioner's Appendix at 3a). The Second Circuit affirmed the dismissal of Massi's due process claim because: (1) Massi did not have a property interest in the receipt of GML § 207-c benefits; and (2) Massi received a hearing and challenged the results of the hearing by bringing an Article 78 proceeding which constitutes an adequate pre-deprivation and post-deprivation remedy under New York law. (See Petitioner's Appendix at 4a).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. The Petition Does Not Present A Conflict Between The Circuits Or An Important Federal Question.

A petition for a writ of certiorari is granted only for compelling reasons. (Sup. Ct. Rule 10). The instant case does not meet any of the criteria established in Rule 10 for granting the petition because the decision issued by the Second Circuit does not conflict with the decision of another United States court of appeals, the New York Court of Appeals or this Court. See also

Singleton v. Commissioner, 439 U.S. 940, 945, 99 S. Ct. 335, 339 (1978) ("the absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari"). Petitioner requests this Court grant the petition because he argues that the Second Circuit misapplied the facts and the law in affirming the District Court's dismissal of his due process and equal protection claims. The District Court and the Second Circuit viewed the facts in the light most favorable to Petitioner and applied controlling legal principles in dismissing his claims. Nonetheless, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Sup. Ct. Rule 10). Accordingly, the Petition For Writ Of Certiorari should be denied.

II. The District Court And Court Of Appeals Properly Dismissed Massi's Due Process Claim As A Matter Of Law.

The District Court and Second Circuit correctly dismissed Massi's due process claim because: (1) Massi did not possess a property right in the receipt of GML § 207-c benefits; (2) Respondents afforded Massi notice and an opportunity to be heard in support of his application for GML § 207-c benefits; (3) Respondents afforded Massi a hearing in compliance with the Order of Justice Smith; and (4) Massi's filing of an Article 78 appeal to challenge the denial of his application for GML § 207-c benefits constitutes an adequate pre-deprivation and post-deprivation remedy under New York law.

A. Massi Does Not Possess a Property Interest In The Receipt Of GML § 207-c Benefits.

Massi must demonstrate that he was deprived of a protected property interest to state a valid procedural due process claim under the Fourteenth Amendment. See Bd. of Regents v. Roth, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705 (1972); Green v. Bauvi, 46 F.3d 189, 194 (2d Cir. 1995). It is well established that a police officer is only entitled to a due process hearing where GML § 207-c benefits are revoked or terminated. See McTigue v. Town of Clarkstown, 21 A.D.3d 374, 375, 798 N.Y.S.2d 915 (2d Dep't 2005); Cole-Hatchard v. Sherwood, 309 A.D.2d 933, 766 N.Y.S.2d 113 (2d Dep't 2003); Olivier v. County of Rockland, 260 A.D.2d 482, 483, 688 N.Y.S.2d 580 (2d Dep't 1999). Massi's GML § 207-c benefits were not revoked or terminated as he was not eligible to initially receive such benefits. It is uncontroverted that a municipality has the discretion to initially determine an employee's eligibility for benefits. See De Paolo v. County of Schenectady, 200 A.D.2d 277, 380, 613 N.Y.S.2d 492, 494 (3d Dep't 1994).

Further, "[a] plaintiff must have a property interest in a benefit that is 'more than an abstract need or desire for it...[He] must, instead, have a legitimate claim of entitlement to it' under state or federal law in order to state a § 1983 claim." Finley v. Giacobbe, 79 F.3d 1285, 1296 (2d Cir. 1996) (quoting Bd. of Regents, 408 U.S. at 577; 92 S. Ct. at 2709)). A police officer who submits an application for GML § 207-c benefits merely possesses an expectation of receiving such benefits. See Schenectady County Sheriff's Benevolent

Ass'n v. McEvoy, 124 A.D.2d 911, 508 N.Y.S.2d 663, 664 (3d Dep't 1986). Accordingly, because Massi does not have a property interest in the receipt of GML § 207-c benefits, the Second Circuit correctly held that he cannot state a viable due process claim.

B. Respondents Provided Massi Notice And An Opportunity To Be Heard Prior To Denying His Application For GML § 207-c Benefits.

Even if Massi possessed a property right in the receipt of GML § 207-c benefits, and if his current Article 78 proceeding challenging the denial of his benefits does not bar his due process claim, Massi's claim still must be dismissed because Respondents afforded Massi due process prior to denying his application for GML § 207-c benefits. "The essential requirements of due process ... are notice and an opportunity to respond." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495 (1985). Respondents provided Massi notice and multiple opportunities to present evidence in support of his application for GML § 207-c benefits prior to denying him benefits. Respondents processed Massi's GML § 207-c application pursuant to its general policies and procedures that apply to all Village of Mamaroneck police officers.

Lieutenant Matero relied on the medical opinion of Dr. Levin in making her recommendation to deny Massi GML § 207-c benefits. Respondents also conducted a four-day hearing before an independent hearing officer, even though they were not required to conduct a hearing under the law, to determine Massi's eligibility for GML § 207-c benefits. The hearing

officer determined Massi was not eligible for GML § 207-c benefits. Massi's ability to present evidence in support of his application for GML § 207-c benefits, both before and during his hearing, satisfies any due process requirements Respondents were required to afford Massi. See Rivera-Powell v. New York City Bd. of Elections, 470 F.3d 458, 466-68 (2d Cir. 2006) (holding that a candidate's opportunity to voice her objection to the removal of her name from the ballot, coupled with an adequate judicial remedy of an Article 78 proceeding to challenge any alleged error, provided her with sufficient due process).

C. Massi Has An Adequate Post-Deprivation Procedure To Challenge Any Purported Deprivation Of His Property Interests.

To prevail under a procedural due process claim, "a plaintiff must show that the 'procedural safeguards... established by the state are insufficient to protect [his] rights.'" Moccio v. New York State Office of Court Administration, 95 F.3d 195, 200 (2d Cir. 1996) (citing Valmonte v. Bane, 18 F.3d 992, 1002 (2d Cir. 1994)). "There is no constitutional violation (and no available [section] 1983 action) when there is an adequate state post-deprivation procedure to remedy a random, arbitrary deprivation of property or liberty." Hellenic American Neighborhood Action Committee v. City of New York, 101 F.3d 877, 882 (2d Cir. 1996). An Article 78 petition is an adequate post-deprivation remedy for due process purposes for violations due to the random and arbitrary acts of state employees. Id. at 881-82. See also Vargas v. City of New York, 377 F.3d 200,

208 (2d Cir. 2004); Gudema v. Nassau County, 163 F.3d 717, 724-25 (2d Cir. 1998).

Respondents appointed independent hearing officer Vincent D'Andrea to conduct Massi's GML § 207-c hearing. On or about June 27, 2008, Mr. D'Andrea denied Massi's application for GML § 207-c benefits because he was malingering the symptoms of PTSD and he was capable of performing light duty work. On or about October 8, 2008, Massi filed an Article 78 proceeding to challenge the denial of his application for GML § 207-c benefits. Massi's Article 78 petition is currently pending before the Appellate Division, Second Department. Because Massi is challenging the denial of his GML § 207-c benefits through an Article 78 proceeding, the District Court and Court of Appeals properly dismissed his due process claim as a matter of law.

D. Massi Improperly Attempts To Advance New Legal Arguments In His Petition.

In his petition, Massi argues that "a fair reading of the Complaint sets forth a conspiracy with Flynn, Holland and Mateo as the principal actors." (Petition at 13). Although it is not clear what type of conspiracy claim Massi attempts to assert in the Petition, he did not advance this argument before the District Court or the Second Circuit. Accordingly, Massi has waived his right to raise this issue in connection with the instant Petition. See Bath Iron Works Co. v. Director, Office of Workers' Compensation Programs, 506 U.S. 153, 162, 113 S. Ct. 692, 698 (1993); Rayway Ref. Co. v. Oxygenated Mtkg. & Trading A.G., 215 F.3d 219,

222 n.2 (2d Cir. 2000) (an appellate court will not consider an issue raised for the first time on appeal). Regardless, Massi's due process claim is invalid for the same reasons discussed above.

III. The District Court And Court Of Appeals Properly Dismissed Massi's Equal Protection Claim As A Matter Of Law.

Massi does not dispute that he alleges a class-of-one equal protection claim or that this Court invalidated class-of-one equal protection claims in the public employment context. See Engquist v. Or. Dep't of Agric., 553 U.S. 591, 128 S. Ct. 2146 (2008). Instead, Massi argues his class-of-one equal protection claim is not barred by this Court's Engquist decision because his employment was not "similarly situated" to Engquist's employment. (Petition at 14). Massi's argument is unavailing. This Court's holding that the class-of-one theory of equal protection has no application in the public employment context bars Massi's equal protection claim. As the Second Circuit correctly summarized, "[b]ecause Massi claims only that he was treated differently from other similarly situated employees for malicious reasons or due to his alleged psychological injury and failure to cooperate with Flynn's investigation of another police officer, and not on the basis of his membership in any particular class, his equal protection claim is barred by Engquist." (See Petitioner's Appendix at 3a).

In his petition, Massi also argues for the first time that he "alleges a conspiracy to essentially remove him from his position" and "deprive him of equal

protection." (Petition at 14). Massi did not advance this argument before the District Court or the Second Circuit. Accordingly, Petitioner has waived his right to raise this issue in connection with the instant Petition. See Bath Iron Works, 506 U.S. at 162, 113 S. Ct. at 698; Rayway Ref. Co., 215 F.3d at 222 n.2. Nonetheless, Massi's admission that he alleges a class-of-one equal protection claim bars his claim as a matter of law.

CONCLUSION

Massi has not presented any compelling reasons for this Court to grant a writ of certiorari. In addition, the District Court and Court of Appeals correctly dismissed Massi's due process and equal protection claims as a matter of law. Accordingly, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

JACKSON LEWIS LLP
One North Broadway, 15th Floor
White Plains, New York 10601
(914) 328-0404

Joseph A. Saccomano, Jr.
Jonathan M. Kozak*
*Counsel of Record

ATTORNEYS FOR RESPONDENTS

Dated: March 26, 2010
White Plains, New York

Bold Appellate Solutions

1140 Broadway, Suite 1602, New York, NY 10001 • Tel: 212-251-0006
www.boldappeal.com

JOB ID: 2010-504